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No. 85-983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR CROSS-PETITIONER UNITED TRANSPORTATION UNION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. Contrary To Cross-Respondents' Assertions, The Questions Presented By Rail Labor Merit Plenary Consideration By This Court	3
II. There Is No Jurisdictional Or Discretionary Bar To This Court's Consideration Of The Questions Presented By The UTU's Cross-Petition	8
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES RELIED UPON:

Brotherhood of Locomotive Engineers v. Chicago & North Western Ry., 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) 4

Brotherhood of Locomotive Engineers v. I.C.C., 761 F.2d 714 (D.C. Cir. 1985) 1

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 5

Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease, 295 I.C.C. 696 (1958) 5

In re Chicago, Milwaukee, St. Paul & Pac. R.R., 658 F.2d 1149 (7th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) 7

Maine Central R.R. Exemption, Finance Docket No. 30532, served September 13, 1985 9

Maine Central R.R. v. Brotherhood of Maintenance of Way Employes, D.Me., Civil Action No. 86-0083-P, filed March 4, 1986 2

New Haven Inclusion Cases, 399 U.S. 392 (1970) 8

New York Dock Railway—Control—B.E.D.T., 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979) 6

New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979) 7

Norfolk & Western Ry.—Merger, 347 I.C.C. 506 (1974) 5

Norfolk & Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), *as modified by, Mendocino Coast Ry., Inc.,—Lease and Operate*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n. v. United States*, 675 F.2d 1248 (1982) 6

Railroad Retirement Board v. Alton R.R., 295 U.S. 330 (1935) 8

	Page
Railway Labor Executives' Assoc. v. United States, 675 F.2d 1248 (D.C. Cir. 1982)	7
Southern Ry.—Control, 331 I.C.C. 151 (1967)	5
Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963)	5
Watt v. Alaska, 451 U.S. 259 (1981)	5
STATUTES AND OTHER MATERIALS:	
Emergency Railroad Transportation Act of 1933, 48 Stat. 211	4
Section 10(a), 48 Stat. 215	4
Section 202, 48 Stat. 219	4
Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*	2
Section 10505, 49 U.S.C. § 10505	9
Section 11341(a), 49 U.S.C. § 11341(a)	*in passim*
Section 11343, 49 U.S.C. § 11343	5
Section 11344, 49 U.S.C. § 11344	6
Section 11347, 49 U.S.C. § 11347	*in passim*
former Section 5(2)(f)	6
former Section 5(12)	4
Rail Passenger Service Act, 45 U.S.C. § 501 *et seq.*	
Section 405, 45 U.S.C. § 565	6
Section 405(b), 45 U.S.C. § 565(b)	6
Section 405(b)(1), 45 U.S.C. § 565 (b)(1)	6
Section 405 (b)(2), 45 U.S.C. § 565 (b)(2)	6
Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31	3,5,6
Section 402(a), 90 Stat. 62	3,6-7
Railway Labor Act, 45 U.S.C. § 151, *et seq.*	2
Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895	9
28 U.S.C. § 1254(1)	8

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REPLY BRIEF FOR CROSS-PETITIONER UNITED TRANSPORTATION UNION

This Reply Brief is respectfully submitted by cross-petitioner United Transportation Union [hereinafter, "UTU"] in reply to several assertions which were advanced by cross-respondents Missouri-Kansas-Texas Railroad Company [hereinafter, "MKT"] and Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] in their responses to the separate cross-petitions by the UTU and by the Brotherhood of Locomotive Engineers (No. 85-997) for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985).

At the outset, it should be recognized that no party to this proceeding has challenged the UTU's assertion that a resolution of the basic question posed by its cross-petition (*i.e.*, does the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, supersede the Railway Labor Act, 45 U.S.C. § 151, *et seq.*) is important to the entire rail industry. Indeed, no one could challenge that assertion because its truth is so apparent, especially in view of recent efforts by rail carriers, emboldened by the ICC's expansive view of its authority, to use the Interstate Commerce Act to abrogate employee rights, both present and prospective. *See, Maine Central R.R. v. Brotherhood of Maintenance of Way Employes*, D.Me. Civil Action No. 86-0083P, filed March 4, 1986 (suit to enjoin strike over dispute arising out of carrier's failure to reach agreement on protective arrangement which would have the effect of supplementing employee protective conditions imposed by ICC in earlier control cases).[1]

Moreover, while the MKT and the ICC may assert that rail labor's questions do not merit plenary review by this Court, their view is not shared by respondents Missouri Pacific and Union Pacific railroads which have filed a short response in support of rail labor's cross-petitions. Cross-petitioner UTU respectfully submits that when the MKT's and ICC's arguments against a granting of the cross-petitions are examined, it becomes obvious that their arguments are premised on false assumptions and are without merit. More important, if this Court grants only the MKT's and ICC's petitions, a decision on solely the limited question presented by those petitions will not resolve the current crisis in rail labor relations. Rather, such a limited analysis will most likely simply aggravate the problem, because it will not resolve the underlying

[1] Cross-petitioner UTU has attached as Appendix C to this Reply Brief a reproduction of the order issued by the *Maine Central* court on March 5, 1986, denying the carriers' request for a preliminary injunction.

issue of whether Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a), can be read as superseding the Railway Labor Act in light of the express limitations on carriers' actions contained in Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347.

I. Contrary to Cross-Respondents' Assertions, The Questions Presented By Rail Labor Merit Plenary Consideration By This Court

According to respondent ICC, plenary review by this Court of the questions presented by rail labor is not warranted because, in the Commission's opinion, its power to approve transactions which require changes in working conditions "is so well settled by a consistent line of recent courts of appeals decisions . . . ." ICC Reply Memorandum at 5. Although couched in different terms, cross-respondent MKT makes a similar argument when it asserts that the Commission's recent view of its "exclusive and plenary" jurisdiction is consistent with its position for decades. MKT Brief at 7-8. Those assertions, cross-petitioner UTU respectfully submits, are flatly wrong, for they fail to recognize the necessity component in Section 11341(a) and they totally ignore the impact which Section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 [hereinafter, "4R Act"], Pub. L. No. 94-210, 90 Stat. 31, 62, has had on the ICC's ability to approve a financial transaction which the carriers contemplate implementing by changing existing employee rights.[2]

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[2] Cross-respondent ICC appears to be asserting that the UTU raised the 4R Act argument "in passing before the Commission . . . ." ICC Reply Memo. at 9. That assertion is false, for the UTU relied upon the 4R Act's amendment to argue as one of its primary arguments to the ICC that the Commission does not have the authority to abrogate employee rights. *See*, Joint Appendix before court of appeals at 8-9. Moreover, that issue was clearly raised by the UTU in the court of appeals and it is the one which the lower court declined to decide. Appendix to ICC Petition in No. 85-792 at 20a-21a.

Although there is some legislative history which supports a more narrow reading of the ICC's immunity powers under what is now Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a) (*compare*, § 10(a) of Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 215, *with*, *Id.* at § 202, 48 Stat. at 219), prior to 1976 it was settled that the ICC's immunity powers could extend to the Railway Labor Act. *See*, *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.* [hereinafter, "*CNW*" case], 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). Cross-petitioner UTU has not questioned that historical fact. However, the pre-1976 breadth of Section 11341(a)'s immunity did not automatically lead to the conclusion that the Interstate Commerce Act superseded the labor statute, for the Commerce Act's immunity provision, by its express terms, did not grant rail carriers an immunity from *all* restraints imposed by other laws. Rather, Section 11341(a)'s predecessors relieved the carriers from the operation of other laws *only* "insofar as may be necessary to enable them to carry into effect the transaction" as approved by the ICC. 49 U.S.C. § 5(12) (1978) (recodified without substantive change by Pub. L. No. 95-473 as 49 U.S.C. § 11341(a)). Cross-respondents MKT and ICC ignore that necessity component in asserting that pre-1976 law supports their view of the statute.

Although prior to 1976 railroads occasionally sought to use the ICC's immunity powers to be relieved of their Railway Labor Act or collective bargaining agreement obligations to their employees, neither the ICC nor any court, except for the Eighth Circuit in the *CNW* case (a case which is clearly distinguishable [3]) ever concluded

[3] As the court observed in the *CNW* case, its decision was limited by the particular facts of that case (314 F.2d at 434); those facts showed that the union had earlier agreed to arbitrate the dispute which it sought in that case to treat as a non-arbitrable dispute. Consequently, that case is in reality one to enforce an agreement to arbitrate.

that it was in fact necessary in a particular case for a carrier to be relieved of its Railway Labor Act or contractual obligations to its employees in order to carry out an approved financial transaction under what is now 49 U.S.C. § 11343. *E.g., Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963); *Norfolk & Western Ry.—Merger*, 347 I.C.C. 506, 511-13 (1974); *Southern Ry.—Control*, 331 I.C.C. 151, 168-71 (1967); *Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease*, 295 I.C.C. 696, 701-02 (1958). While it is correct that in each of the above cases, either the court or the ICC observed that the ICC's immunity powers under what is now Section 11341(a) could extend to the Railway Labor Act or to other labor laws, that fact is immaterial; what is important, however, is that the carriers were never able to sustain their necessity hurdle.[4]

In this case, the ICC ignored the necessity component of Section 11341(a) in concluding that its immunity powers automatically operated to relieve the trackage rights carriers of their Railway Labor Act and contractual obligations to their employees. Since, in the more than fifty years that the Railway Labor Act has existed side-by-side with the ICC's immunity powers, this case is the first instance in which the ICC has concluded that a conflict exists between the two Acts, it is clear that rail labor, and not the MKT, is correct in alleging that there has been an abrupt and unexplained "reversal of its field" by the ICC in this case. *See*, MKT Brief at 4. That unexplained change in position, the UTU respectfully submits, clearly warrants plenary review by this Court in light of the 4R Act's amendment to Section 11347.

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[4] That necessity component, cross-petitioner UTU submits, is essentially an accommodation of two statutes akin to the accommodation required by the principles of both *Watt v. Alaska*, 451 U.S. 259, 267 (1981), and *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172-73 (1962). *See*, UTU Cross-Petition at 19-20.

Section 402(a) of the 4R Act amended former Section 5(2)(f) of the Interstate Commerce Act (recodified as 49 U.S.C. § 11347) to add to that provision a new sentence which read as follows: "Such arrangement [*i.e.*, the protective arrangement required in all merger and unification cases] shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. § 565)." 90 Stat. at 62. By incorporating the protection of Section 405 of the Rail Passenger Service Act into protective arrangements' requirements under the consolidation provisions of the Interstate Commerce Act, Congress has required that the ICC protective arrangement contain "such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits . . . to such employees under existing collective-bargaining agreements or otherwise; [and] (2) the continuation of collective-bargaining rights . . . ." 45 U.S.C. § 565(b). Those requirements have been implemented by Article 1, Sections 2 [5] and 3 [6] of the ICC employee protective provisions which provide that existing collective bargaining agreements (including job security agreements) and collective bargaining rights "shall be preserved unless changed by future collective bargaining agreements or applicable statutes." *New York Dock* conditions, Art. 1, § 2, 360 I.C.C. at 84.

Cross-Petitioner UTU has asserted throughout this case that the effect of the 4R Act's adoption of the levels of protection mandated by 45 U.S.C. § 565(b)(1) and (2) is to require that all carriers planning to carry out a financial transaction approved under 49 U.S.C. § 11344 agree to preserve existing employee agreements and Railway Labor Act rights. In other words, Section 402(a) of the 4R

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[5] This provision is quoted at page 5 of the UTU's Cross-Petition.

[6] *See, New York Dock* conditions, 360 I.C.C. at 84-85; *Norfolk & Western* conditions, 354 I.C.C. at 610.

Act eliminated whatever potential power the immunity provisions of Section 11341(a) gave the ICC prior to 1976 to relieve a carrier of its Railway Labor Act or employee contractual obligations, because Section 11347 now requires that the ICC condition any approval of a financial transaction to which Section 11341(a) is applicable by mandating the preservation of existing employee contracts and Railway Labor Act rights. As the D.C. Circuit observed, the validity of this position "turns on whether Section 11347 is viewed as a 'law' that may be appropriately waived, or as a specific qualification on the exemption authority itself." ICC App. at 21a. This question clearly merits plenary review by this Court because it is obviously disputed and has not been resolved authoritatively by this Court.

To support its assertion that plenary review is not warranted, the ICC states that recent appellate court decisions have upheld its authority to approve transactions which require changes in working conditions. ICC Reply Memo. at 5. In making that argument, cross-respondent ICC relies upon several post-1976 decisions which concluded that various protective arrangements satisfied the minimum levels of protection required by Section 11347. *New York Dock Ry. v. United States,* 609 F.2d 83 (2d Cir. 1979)(upholding conditions to be imposed in purchase, merger, and control cases); *Railway Labor Executives' Assoc. v. United States,* 675 F.2d 1248 (D.C. Cir. 1982)(upholding conditions to be imposed in lease and trackage rights cases); *In re Chicago, Milwaukee, St. Paul & Pac. R.R.,* 658 F.2d 1149 (7th Cir. 1981), *cert. denied,* 455 U.S. 1000 (1982)(upholding conditions to be imposed in specific abandonment cases at issue). Those cases, however, offer no support to the ICC in this case because the courts never addressed the question of the impact of an ICC order on existing collective bargaining agreements and employee rights. Moreover, there is not the slightest indication in those opinions that ICC-imposed

employee protective conditions could be used legitimately to change existing agreements, notwithstanding the specific prohibition against such changes in Article 1, Section 2 of the protective arrangements. Cross-respondent ICC attempts to broaden the holdings of those cases by engaging in the most transparent circular reasoning—it erroneously assumes that its protective conditions now authorize changes in working conditions, and since the courts have previously upheld these conditions as satisfying Section 11347, those court decisions, the ICC opines, should be viewed as agreeing with its new and expansive view of its order and protective conditions. That circular reasoning, the UTU respectfully submits, is frivolous. Simply stated, there is no post-1976 appellate support for the ICC's position.

II. There Is No Jurisdictional Or Discretionary Bar To This Court's Consideration Of The Questions Presented By The UTU's Cross-Petition

Cross-respondents MKT and ICC both assert that this Court should deny the cross-petitions in this case because, in their opinion, this Court should not accept for review an issue which has not been decided by the court of appeals. While the UTU recognizes that this Court will usually not consider on a writ of certiorari an issue not decided by the lower court, there is no jurisdictional bar to the grant of a writ to consider such an issue. *E.g.*, 28 U.S.C. § 1254(1); *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970); *Railroad Retirement Board v. Alton R.R.*, 295 U.S. 330, 344 (1935).

Moreover, there is no discretionary reason for not granting certiorari on the cross-petitions in this case because the judgment of the court of appeals which the MKT and ICC seek to review directs a remand to the ICC for consideration of the necessity component of Section 11341(a). That judgment aggrieves rail labor for, as the UTU argued before both the ICC and the court of

appeals, there is no need to examine the necessity issue in this case, if, as it asserts, Section 11341(a) does not override employee Railway Labor Act and contractual rights. If rail labor is correct in its construction of Section 11341(a)'s relationship with Section 11347, there will be no reason to consider the issue raised by both the MKT and the ICC in their separate petitions, and, thus, it would be improvident to ignore the questions presented by the cross-petitions on a review of the issue raised by the MKT and ICC petitions.

On the other hand, consideration of the MKT's and ICC's "self-executing" question without a simultaneous consideration of rail labor's issues, will clearly prejudice rail labor, regardless of the outcome of that review. Ever since the ICC announced in this case that its order can override the Railway Labor Act and employee contractual rights, the railroads have gleefully accepted that invitation and have frequently asserted in many ICC-related cases which do not even involve Section 11341(a) that such abrogation of employees' rights is necessary.[7] The validity of the UTU's observation may easily be seen from the number of cases in which the relationship between the two Acts has been raised in the past two years (*see*, ICC Pet. at 17 n.13), for there are now more cases pending in which this issue has been presented than existed during the period from 1926 when the Railway Labor Act was enacted until 1980 with passage of the Staggers Rail Act. Any delay in a full resolution of this issue can only prejudice rail labor, for until the ICC is informed that it cannot override employee rights, the present attack on those crucial rights will continue virtually unabated.

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[7] Cross-respondent ICC suggests that the case involving its decision of September, 1985 in *Maine Central R.R.—Exemption* (reproduced as Addendum B to the ICC's petition) would be a better vehicle to resolve the issues raised by rail labor. We disagree, for the *Maine Central* case involves an exemption under 49 U.S.C. § 10505 to which § 11341(a) is not applicable. Consequently, the conflict between §§ 11341(a) and 11347 is not presented in that case.

CONCLUSION

For the reasons set forth herein and in the Cross-Petition, the UTU urges that its Cross-Petition be granted.

Respectfully submitted,

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APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 86-0083-P

MAINE CENTRAL RAILROAD COMPANY and
PORTLAND TERMINAL COMPANY,
Plaintiffs,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Defendant.

CARTER, District Judge

MEMORANDUM OF DECISION DENYING MOTION FOR PRELIMINARY INJUNCTION

In this action Plaintiffs seek to enjoin Defendant union from striking over the inclusion of certain job protection provisions in their contract. Currently before the Court is Plaintiffs' motion for a preliminary injunction.[1] In order for Plaintiffs to prevail on their claim

[1] Although initially filed as a motion for a temporary restraining order, Defendant received notice and a hearing was held. The Court will, therefore, treat the motion for a temporary restraining order as a motion for a preliminary injunction. *Stanton v. Brunswick School Department*, 577 F. Supp. 1560, 1562 (D. Me. 1984).

for such relief, the Court must find (1) that the Plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which the granting of injunctive relief would inflict on the Defendant; (3) that Plaintiffs have exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction. *Stanton v. Brunswick School Department,* 577 F. Supp. 1560, 1566-67 (D. Me. 1984). After reviewing the written submissions of Plaintiffs and considering the oral presentations of both parties, the Court finds that Plaintiffs have failed to show a likelihood of success on the merits.

Plaintiffs argue that the union's protection demands conflict with protection provisions imposed by the Interstate Commerce Commission under 49 U.S.C. § 11347 in its orders approving consolidation of the Maine Central Railroad Company, Boston & Maine Corporation, and the Delaware & Hudson Railway Company under the control of Guilford Transportation Industries. They further contend that under the Interstate Commerce Act, job protection provisions imposed by the Commission preclude a strike on the issue of job protection because, under 49 U.S.C. § 11341(a), carriers participating in transactions approved by the Commission are exempt from all other laws "as necessary to let [them] carry out the transaction, . . . and exercise control acquired through the transaction."

It is clear that the ICC did in fact issue orders approving Guilford Transportation's control over Plaintiff Railroad and others that included the so-called "New York Dock" job protection conditions.[2] Such orders relate to disputes arising directly out of the transaction approved by the order. *International Association of Machinists v. Northeast Airlines,* 473 F.2d 549, 559-60 (1st Cir. 1972); *Brotherhood of Locomotive Engineers v. Chicago & North*

[2] *New York Dock Ry. v. United States,* 609 F.2d 83 (2d Cir. 1979).

Western Railway, 314 F.2d 424 (8th Cir. 1963). The record before the Court does not show that the job protections that are the subject of the strike which Plaintiffs seek to enjoin relate to the transaction that was the subject of the ICC orders. It is not clear that the union's demands relate to employees covered by the New York Dock conditions.[3] Neither is there any evidence to establish that the job protection provisions sought in the negotiations by the maintenance of way employees represented by the Defendant would in any way interfere with or defeat the carrier's efforts to complete the approved transaction.

Plaintiffs also argue that the union is not free to strike under the Railway Labor Act because it has not "exert[ed] every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute . . . ." 45 U.S.C. § 152 First. Again the Court finds that Plaintiffs have not met their burden of showing likelihood of success on the merits. They base their contention on allegations in the complaint that Defendant, with only one exception, has refused to bargain on any issue other than job protection. Plaintiffs conceded at oral argument that Defendant has complied with the exhaustive requirements of the Railway Labor Act and that job protection is indeed an issue of vital importance to the union. Under certain factual circumstances, insisting on resolution of one issue before bargaining on others could possibly violate the duty set forth in section 2 First. *See, e.g., Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 10-12 (1st Cir. 1981). On the present record, however, the Court cannot conclude

[3] There remains a substantial legal question whether, even if the demands being pressed by the union were indeed covered by the ICC order, the union is precluded from striking. The Court need not resolve this issue in light of the lack of factual support for the Plaintiffs' position that the strike relates to issues covered by the ICC orders.

that the union has failed to satisfy its duty to "exert every reasonable effort to make and maintain agreements . . . and to settle all disputes."

The reasonableness of the union's position is to be judged by whether it reflects sufficient indicia of flexibility to justify the conclusion that the union still desires to achieve agreement. *Eastern Maine Medical Center,* 658 F.2d 1. That issue is to be determined not on broad allegations but by viewing the context and the course of discussions. For example, the union's bargaining position on the initial issue may well have been precipitated by a harsh bargaining stance on the part of the Railroad. In order to assess reasonableness, therefore, the Court must have before it evidence of what transpired in bargaining and the tenor of both parties in expressing their positions. No such evidence has been presented. The Court cannot conclude from the record made in these proceedings that the union's position in respect to bargaining on issues besides job protection has hardened to an unacceptable level of inflexibility.

Accordingly, it is *ORDERED* that Plaintiffs' Motion for a Preliminary Injunction be, and it is hereby, DENIED.

/s/ GENE CARTER
Gene Carter
United States District Judge

Dated at Portland, this 5th day of March, 1986.

A TRUE COPY
ATTEST: WILLIAM S. BROWNELL,
CLERK
By ELIZABETH SIMMONS
Deputy Clerk